FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 25 1978
MICHAEL RODAK, JR., CLERK

(Submitted upon Consent of the Parties)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

PACIFICA FOUNDATION,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

IRWIN KARP
Attorney for The Authors League of America, Inc., as Amicus Curiae
234 West 44th Street
New York, New York 10036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

PACIFICA FOUNDATION,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the Authors League

The Authors League is the national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases involving freedom of expression, and it has therefore filed briefs *amicus curiae* in several appeals heard by the Court. The Authors League believes that the declaratory order of the Federal Communications Commission is an unconstitutional restraint on freedom of expression in radio broadcasting. Consequently, the League—with the consent

of the parties—submits this brief *amicus curiae* urging the Court to affirm the judgment of the Court of Appeals reversing the Commission's order.

ARGUMENT

The Commission's ban on "indecent" words violates the First Amendment.

1. The Authors League believes that the Commission's order was an act of censorship barred by 47 U.S.C. Sec. 326 for the reasons stated by Judge Tamm, and that it violated the First Amendment for the reasons stated by Chief Judge Bazelon. As he noted, prohibiting broadcasts containing the seven words until early morning effectively bans them for most adults.

2. The order, if reinstated, would impose a significant restraint on freedom of expression of non-commercial radio stations that furnish much of the serious programming in this medium. The ban on the seven itemized words, or on other "words such as" the indecent seven, would prevent stations from broadcasting readings from books, essays and poetry by many eminent writers—works that employ these words in depictions of sex that are not obscene, or use the words in non-sexual contexts, or use them to denote many of their non-sexual meanings. Some of these authors are listed in Judge Tamm's opinion, in footnote 17.

The Commission would substitute an unconstitutional censorship order for the editorial judgment of non-commercial stations in determining when readings from such books and other material should be broadcast. For the reasons discussed below, this preemption of editorial responsibility cannot be justified on theories that radio is an irresistable "thrusting" medium or that a broadcast

containing the words is a deadly menace to children. And neither theory justifies the order's violation of the First Amendment.

3. The Authors League submits that the order's purpose and illogical consequences are impossible to reconcile with the First Amendment.

(i) The Commission did not contend that Mr. Carlin's monologue was obscene. Clearly it was not. However, the Commission concluded that the banned words "depict" sexual and excretory activities in a manner offensive for the broadcast media. But the words, standing alone, do not "depict" these activities in the dictionary or the First Amendment sense. They do not *describe* ultimate sexual or excretory acts—as would a scene in a television drama or an episode narrated in a novel. Each word simply denotes an act. And Mr. Carlin did not use the words as part of a description of ultimate sexual acts, but rather in a discussion of our attitudes and reactions to the seven words, and their multiplicity of meanings—many of which are *not* sexual and not excretory.

Actually, the Commission's order was a "matter of conditioning and etiquette." And the First Amendment should not have to give way to etiquette. The eminent lexicographer Stuart Berg Flexner notes:

> "There is, of course, no logical reason why *fuck, screw, make* (1922), or any other term (see OH SHIT!) should be 'dirty', shocking, or taboo, no logical reason why they should be considered any different than such synonyms as *copulate, sexual intercourse* or *feces.* It's a matter of conditioning and etiquette." (I HEAR AMERICA TALKING; p. 157. Van Nostrand Reinhold. New York, 1976)

Referring to Mr. Flexner's preface to the DICTIONARY OF AMERICAN SLANG, Theodore M. Bernstein says:

> "The reason for the frequent use of such words, as he points out, is undoubtedly that 'slang words for sexual attractions and for a variety of sexual acts, positions and relationships are more common than standard words,' which are scarce or remote and scientific. There is not, for example, a single transitive verb in respectable or even in scientific language that expresses the idea of the slang word *fuck*. As to other bodily functions, a somewhat similar situation prevails. There are no words for *shit* and *piss* aside from the correct but stilted verbs *defecate* and *urinate*." (SLANG AND ITS ANALOGUES, J.S. Farmer and W.E. Henly, 1890-1904; Reprint 1970, Arno Press; New York. Introduction, at p. 1)

The Commission's order would have barred WBAI from broadcasting these comments by Mr. Flexner and Mr. Bernstein, since they contained three of the seven forbidden words. It is not clear whether the Commission's ban was limited to the seven words, or whether it also applied to synonyms. In either event, the consequences cannot be reconciled with the First Amendment.

(ii) If the Commission's order is limited to the seven words, then radio stations could broadcast works containing synonyms for them. Each of the words has a rich variety of synonyms; some also considered "vulgar", others having a double meaning: words that convey a conventional meaning and also denote a sexual act. Mr. Flexner discusses some of the synonyms for "fuck" that carry the same taboo (op. cit., p. 157). And there are many double-entrendre synonyms: e.g. "make" and "bang". (THE AMERICAN HERITAGE DICTIONARY OF THE AMERICAN LANGUAGE,

American Heritage Publishing Co., Inc. and Houghton Mifflin Company; 1969).

If the order is limited to the seven words, then it would not apply to a similar monologue/essay that uses "fellatrice" instead of "cocksucker" (DICTIONARY OF AMERICAN SLANG, Wenthworth and Flexner; Thomas Y. Crowell, New York. 1975); or employs a pointed Oedipus/Jocasta word symbol for "motherfucker"; or substitutes for "cunt" any one of an enormous array of synonyms—some carrying the same taboo, others of the double-entendre variety. (See pages 336, 337, 338, 339, 340; SLANG AND ITS ANALOGUES; pages 341, 342, 343, 344, 345 for foreign synonyms.)

If the order is limited to the seven words, then a non-commercial radio station could broadcast a passage which used an acronym (e.g. SNAFU) or initials (e.g. F.O., or F.T.A., or G.F.U.) for one of the forbidden words (I HEAR AMERICA TALKING, pages 158-159); or a foreign synonym such as "merde" or "emmanche" (DICTIONARY OF FRENCH AND AMERICAN SLANG, Leitner and Lanen; Crown Publishers, Inc., New York; 1965); or read it with a quasi-ellipsis: for example "f—dot—dot—k".

Thus, if the order permits the broadcasting of many other words that denote the same sexual acts as the forbidden seven, and equally affront the sensitive in WBAI's audience—the Commission's rationalization for the order collapses. Moreover, the order prohibits the broadcast of the seven in their many non-sexual contexts. The word "fuck" has many meanings other than sexual intercourse (see, e.g. THE AMERICAN HERITAGE DICTIONARY; I HEAR AMERICA TALKING, pp. 158-159); and each of the other six words also have several non-sexual and non-excretory meanings. Many examples are discussed in the authorities we have cited. (See also A DICTIONARY OF SLANG AND UN-

CONVENTIONAL USAGE, Eric Partridge; 7th Ed. MACMILLAN PUBLISHING CO. INC., N.Y.)

(iii) If the Commission intends the order to apply to synonyms, to other "words such as" the indecent seven, this greatly increases its intrusion on the First Amendment. Broadcasts of readings from a vast catalog of valuable literary and dramatic works would pose the threat that some listeners, or even a single listener scanning the dial in his car with his son, might recognize a "taboo" or double-entendre synonym for one of the forbidden seven—or a word denoting some other sexual act.

The enormous range of these words, and the subjective judgments involved in weighing their nuances and potential impact on listeners of widely varying sensibilities, would require prodigious research in the standard reference works. The practical result would be that non-commercial radio stations would "steer wide" of innumerable works of merit rather than do this work or risk stumbling on a verbal land mine.

The risk is magnified because slang changes so rapidly. (SLANG AND ITS ANALOGUES, third page of Theodore Bernstein's introduction.) At what point would a radio producer be required to know that a phrase like "go down on" had become a slang synonym for "fellatio"? (THE AMERICAN HERITAGE DICTIONARY; see "down".) Or that a seemingly innocent slang expression had reacquired an older "taboo" meaning.

> *"Old hat* these days means out-of-date or not new. But in the 1700's the now-extinct meaning of the expression was—yes—the female pudendum." (SLANG AND ITS ANALOGUES, third page)

If "old hat" reacquired its earlier meaning, perhaps in response to the challenge of the Commission's order, would

an unsuspecting producer violate the order if he broadcast this old-new slang synonym for "cunt"?

The Commission's rationalization for the order do not justify its intrusion on the First Amendment.

1. The Commission defends its preemption of the editorial judgment of individual stations with the argument that broadcasting is an intrusive, a thrusting, medium. We submit this rationalization is invalid. Radio broadcasting is not more intrusive than a book. An offended reader can close the book. An offended listener can turn off the set—or tune to another station. Most listeners do this in a second or two when a program bores or irritates them.

In most broadcast areas, this leaves the listener with a large number of program options. WBAI, for example, is one of 84 AM and FM stations listed in the *New York Times* for the convenience of readers in that broadcast area. (N.Y. Times, March 20, 1978; p. C21)

Moreover, the Commission is not dealing with a situation in which a non-commercial station or stations had abdicated all editorial judgment and responsibility (a problem that requires solutions other than censorship.) The question was not whether WBAI had devoted so much of its time to programs containing dirty words that it was not serving the public interest of its audience. Nor have other non-commercial stations been afflicted with such a collapse of editorial judgment.

We have stressed non-commercial radio stations in our discussion because they are most affected. Commercial radio and television stations do not broadcast much (if any) reading from literary or dramatic works, and they are less

exposed to censorship under an order banning indecent *words*. This also is true, to a large degree, of public television.

2. The second rationalization offered by the Commission for its order is the need to protect children against any exposure to the seven words if they listen to non-commercial radio. This rationalization is invalid. In imposing a ban that violates the First Amendment, even for children, the Commission acted on some very tenuous assumptions as to the need for the order. For example: it does not know how many of the children (in various age groups) who actually listen to WBAI have heard or read the seven forbidden words in their homes; or in the streets, subways, schools, libraries, playgrounds, paperback bookstands, or record shops of their metropolitan area.

Moreover, the Commission can safely assume that most of the children protected by its order against a 9 PM or 10 PM broadcast of the Carlin monologue actually would be watching television at that time, often without parental supervision. And the Commission is well aware of the television fare which these children, unprotected by any censorship order, could choose from.

> "Just this season, Edith Bunker survived a rape attempt and discovered that her deceased spinster sister was a lesbian. 'Baretta' explored the sleazy world of male prostitution, while 'Police Woman' exposed a white-slave ring specializing in teen-agers. NBC dealt with an incest fantasy ('Sharon: Portrait of a Mistress'), the seduction of a gigolo by a 15-year-old girl ('Aspen') and nymphomania and female frigidity ('What Really happened to the Class of '65?') In two weeks, NBC will test just how far television can go when it presents a six-hour, three-part adaptation of 'Loose Change,' Sara Davidson's let-it-all-hang-out memoir of the 60's counter-culture. The mini-series offers up two deflowerings, a teacher exposing himself to his class and a woman finally achieving her first climactic orgasm—out of wedlock of course—after ten years of failure." (NEWSWEEK, February 20, 1978; p. 54)

None of these programs would be barred by the order, so long as the seven words were not used. Against this background, the Commission's ban on seven *words,* words which were not used in any depiction of conduct, reveals itself for what it is—a pointless triumph of taboo over freedom of expression in a dedicated medium whose producers and broadcasters require the full protection of the First Amendment.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., as Amicus Curiae
234 West 44th Street
New York, New York 10036

Certificate of Service

I, IRWIN KARP, a member of the Bar of this Court, certify that three copies of the Brief of the Authors League of America, Inc., as *amicus curiae* was served by mail this 24 day of March, 1978, on counsel for the respondent and on counsel for the petitioner.

.....

IRWIN KARP
Attorney for The Authors League of America, Inc., as Amicus Curiae
234 West 44th Street
New York, New York 10036
(212) 391-9198